RAMLAH ABDULLAH

v.

TALASCO INSURANCE SDN BHD & ANOR

COURT OF APPEAL, PUTRAJAYA
JAMES FOONG JCA
ZALEHA ZAHARI JCA
KN SEGARA JCA
[CIVIL APPEAL NO: T-02-65-2006]
23 JANUARY 2009

CIVIL PROCEDURE: *Res judicata - Finality of earlier decision - Issue earlier decided in subordinate court - No appeal lodged against decision - Subsequent attempt to relitigate issue in fresh action in the High Court - Whether res judicata applicable*

EQUITY: *Estoppel - Res judicata - Issue earlier decided in subordinate court - No appeal lodged against decision - Subsequent attempt to relitigate issue in fresh action in the High Court - Whether res judicata applicable*

INSURANCE: *Motor insurance - Motor Insurers' Bureau - Uninsured driver - Action not instituted or pleaded against Motor Insurers' Bureau - Whether indemnity recoverable from Motor Insurer's Bureau*

TORT: *Damages - Road accident - Uninsured driver - Action not instituted or pleaded against Motor Insurers' Bureau - Whether indemnity recoverable from Motor Insurer's Bureau*

TORT: *Vicarious liability - Road accident - Whether vicarious liability only confined to master and servant relationship - Whether vicarious liability included acts of agent*

The appellant was seriously injured in an accident whilst traveling in a car owned by Proton and insured by Talasco ('the said car'). The said car was meant for the use of a Proton executive. The executive had lent the car to an acquaintance who had in turn asked his brother – Wan Din – to drive the said car. The accident occurred whilst Wan Din was driving the said car. The appellant sued Wan Din as driver and Proton as owner for damages in the Sessions Court. The Sessions Court allowed the appellant's claim against Wan Din but dismissed the claim against Proton. The appellant thereafter issued notice under s. 96(2) of the RTA to Talasco, as insurer of the said car and then filed a civil suit in the High Court against Talasco to recover the judgment sum awarded

in the Sessions Court. Talasco argued that it was not obliged to settle the judgment sum as its policy did not cover Wan Din. Proton, added as a third party also argued that as the claim against it was dismissed, this implied that it was not vicariously liable to the appellant for the negligent driving of Wan Din. The High Court dismissed the suit against Talasco and also dismissed Talasco's Third-Party claim against Proton with costs to be paid by the appellant. The appellant also claimed an indemnity, *albeit* unsuccessfully from the Motor Insurers' Bureau ('MIB'). The appellant thus appealed to the Court of Appeal.

Held (dismissing the appeal)
Per James Foong JCA delivering the judgment of the court:

(1) The appellant's pleaded case against Talasco was based solely on s. 96(1) of the RTA. MIB was never included as a party to the proceedings nor was the appellant's claim framed against MIB. If at all the appellant desired to claim against MIB, she should have pleaded this and included MIB as a party to the proceedings *Ramli Shahdan & Anor v. Motor Insurer's Bureau of West Malaysia & Anor* (refd).

(2) Vicarious liability is not confined to a master and servant situation. It includes master and servant and/or agent. The appellant had clearly pleaded that Wan Din was driving the said car as Proton's agent. Thus the Sessions Court's finding that there was no vicarious liability on the part of Proton meant that no order or permission was ever given by Proton to Wan Din to drive the said car.

(3) Since the vicarious liability issue had been decided by the Sessions Court and there had been no appeal against the decision, *res judicata* would apply. The policy of insurance issued by Talasco to Proton was ineffective since it did not cover Wan Din – a person driving without the order or permission of the policyholder – Proton. *Hartecon JV Sdn Bhd & Anor v. Hartela Contractors Ltd* (folld)

Bahasa Malaysia *Translation Of Headnotes*

Sewaktu dalam perjalanan di dalam sebuah kereta Proton yang diinsurankan oleh Talasco ("kereta tersebut"), pihak perayu telah terlibat di dalam suatu kemalangan dan mengalami kecederaan. Kereta tersebut bertujuan untuk digunakan oleh eksekutif Proton. Eksekutif tersebut telah meminjamkan kereta tersebut kepada

seorang kenalannya dan kenalannya pula telah meminta saudara lelakinya – Wan Din – untuk memandu kereta tersebut. Kemalangan berlaku sewaktu Wan Din memandu kereta tersebut. Pihak perayu telah menyaman Wan Din sebagai pemandu dan Proton sebagai tuanpunya untuk gantirugi di Mahkamah Sesyen. Mahkamah Sesyen telah membenarkan tuntutan perayu terhadap Wan Din tetapi telah menolak tuntutannya terhadap Proton. Perayu kemudiannya telah mengeluarkan notis di bawah s. 96(2) Akta Pengangkutan Jalan terhadap Talasco, sebagai penginsuran kereta tersebut dan kemudiannya telah memfailkan suatu guaman sivil di Mahkamah Tinggi terhadap Talasco untuk mendapat jumlah penghakiman yang diawardkan di Mahkamah Sesyen. Talasco mempertikaikan obligasinya untuk menyelesaikan jumlah penghakiman tersebut atas alasan bahawa polisi mereka tidak merangkumi Wan Din. Proton, sebagai pihak ketiga juga telah mempertikaikan liabilitinya kepada perayu dengan mengatakan bahawa memandangkan tuntutan perayu terhadapnya telah ditolak, implikasinya adalah bahawa mereka tidak bertanggungan secara vikarius kepada perayu untuk kecuaian memandu Wan Din. Mahkamah Tinggi telah menolak tuntutan terhadap Talasco dan juga tuntutan pihak ketiga Talasco terhadap Proton dengan kos terhadap perayu. Perayu juga telah menuntut untuk tanggung rugi daripada Biro Penanggung Insuran Kereta ('MIB') yang mana tidak dibenarkan. Perayu kemudiannya telah membuat rayuan kepada Mahkamah Rayuan.

Diputuskan (menolak rayuan perayu)
Oleh James Foong HMR menyampaikan penghakiman mahkamah:

(1) Kes perayu terhadap Talasco hanya berdasarkan s. 96(1) Akta Pengangkutan Jalan. MIB tidak pernah disertakan sebagai parti kepada prosiding dan kes perayu tidak pernah ditujukan kepada MIB. Sekiranya perayu bertujuan membuat tuntutan terhadap MIB, ianya seharusnya memplidkan fakta ini dan menyertakan MIB sebagai parti kepada prosiding *Ramli Shahdan & Anor v. Motor Insurer's Bureau of West Malaysia & Anor* (dirujuk).

(2) Tanggungan vikarius tidak terhad kepada situasi yang melibatkan hubungan majikan dan pekerja sahaja. Ianya termasuk majikan dan pekerja dan/atau agen. Perayu telah memplidkan dengan jelas bahawa Wan Din telah memandu kereta tersebut sebagai agen Proton. Maka keputusan

Mahkamah Sesyen bahawa tiada tanggungan vikarius di pihak Proton bermakna bahawa Proton tidak pernah memberi arahan atau kebenaran kepada Wan Din untuk memandu kereta tersebut.

(3) Memandangkan bahawa isu tanggungan vikarius telahpun diputuskan oleh Mahkamah Sesyen dan tiada rayuan difailkan terhadap keputusan tersebut, prinsip *res judicata* terpakai. Polisi insuran yang dikeluarkan oleh Talasco kepada Proton tidak mempunyai kesan kerana ianya tidak merangkumi Wan Din – seorang yang telah memandu kereta tersebut tanpa kebenaran pemegang polisi – Proton. *Hartecon JV Sdn Bhd & Anor v. Hartale Contractors Ltd* (diikuti)

Case(s) referred to:
Hartecon JV Sdn Bhd & Anor v. Hartela Contractors Ltd [1997] 2 CLJ 104 CA ***(foll)***
Rafiah Bakar v. East West-UMI Insurance Bhd [1993] 1 CLJ 431 HC ***(refd)***
Ramli Shahdan & Anor v. Motor Insurer's Bureau of West Malaysia & Anor [2006] 1 CLJ 224 CA ***(refd)***

Legislation referred to:
Road Transport Act 1987, ss. 90(1), 91(1)(b), 95, 96(1), (2)

For the appellant - Americk Sidhu; M/s Isharidah Ho Chong & Menon
For the 1st respondent - Mohd Fuad Husaini; M/s Othman Hashim & Co
For the 2nd respondent - S Nantha Balan (Daya Nair with him); M/s Nik Saghir & Ismail

[Appeal from High Court, Kuala Terengganu; Civil Suit No: 22-08-2000]

[Editor's note: For the High Court judgment, please see Ramlah Abdullah lwn. Talasco Insurance Sdn Bhd; Perusahaan Otomobil Nasional Bhd (Pihak Ketiga) [2007] 10 CLJ 674.]

Reported by Andrew Christopher Simon

JUDGMENT

James Foong JCA:

Introduction

[1] The High Court has dismissed the appellant's recovery claim with costs against the 1st respondent (Talasco) made under s. 96(1) of the Road Transport Act 1987 (RTA). It also dismissed

Talasco's third party claim against the 2nd respondent (Proton) with costs to be paid by the appellant. Dissatisfied with this decision, the appellant appealed to us.

Background

[2] On 6 May 1989 the appellant was a passenger in a motor car no. WBK 398. While it was travelling along the Kuantan – Kemaman Highway at or about 2.30am it was collided into by another motor car no. BCQ 8343. At the material time, BCQ 8343 was driven by one Wan Din bin Hussin (Wan Din). As a result of this accident, the appellant was severely injured.

[3] On 14 April 1994, the appellant filed a civil action in the High Court at Kuantan against Wan Din as 1st defendant who negligently drove the motor car BCQ 8343 and against Proton, as 2nd defendant, for being the owner of the said car.

[4] This civil action was subsequently transferred to the Sessions Court at Kuala Terengganu bearing number 53-100-98. I shall refer to this civil action as Civil Action 53-100-98.

[5] On 27 July 1999, the Sessions Court at Kuala Terengganu after hearing allowed the appellant's claim against Wan Din (Wan Din having failed to defend the action) and awarded her a sum of RM554,979.26 as damages, interest and costs. The appellant's claim against Proton was dismissed.

[6] On 10 September 1991, the appellant gave notice under s. 96(2) RTA to Talasco, the insurer of BCQ 8343 at the material time of the accident. This was soon followed by this civil suit against Talasco for the recovery of the judgment sum handed down in Civil Action 53-100-98.

[7] Talasco, the defendant in this civil suit, brought in Proton as third party under s. 95 RTA to recover from Proton any sum Talasco may be ordered to pay the appellant.

Principal Issue: Previous Finding Of Proton Not Being Vicariously Liable

[8] Talasco's main defence is that they are not liable to the appellant since the insurance policy which they issued to Proton for the use of the said car is ineffective. The policy only covers "Persons or classes of persons entitled to drive (are) Any person who is driving on the Policyholder's order or with their

permission". Since Wan Din was not permitted by Proton to drive BCQ 8343, Talasco is not obliged under s. 96(1) RTA to settle the judgment sum in favour of the appellant obtained in Civil Action 53-100-98.

[9] Proton in their pleadings supported the stand taken by Talasco. In addition, it highlighted the decision in Civil Action 53-100-98 which dismissed the appellant's claim against Proton as owner of the said car. This implies that Proton was not vicariously liable to the appellant when Wan Din, not being its servant and/or agent, was driving the said car without the order or permission of Proton.

The Law

[10] To fully appreciate arguments in this appeal, it is necessary to first set out the law.

[11] Section 90(1) RTA specifies that:

> it shall not be lawful for any person to use or to cause or permit any other person to use, a motor vehicle unless there is in force in relation to the user of the motor vehicle by that person or that other person, as the case may be, such a policy of insurance or such a security in respect of third party risks as complies with the requirements of this Part.

[12] Section 91(1)(b) RTA insists that such a third party risks insurance policy must be a policy which:

> insures such person, or class of persons as may be specified in the policy in respect of any liability which may be incurred by him or them in respect of the death of or bodily injury to any person caused by or arising out of the use of the motor vehicle or land implement drawn thereby on a road: ...

[13] Then under s. 96(1) RTA:

> If, after a certificate of insurance has been delivered under subsection (4) of section 91 to the person by whom a policy has been effected, judgement in respect of any such liability as is required to be covered by a policy under paragraph (b) of subsection (1) of section 91 (being a liability covered by the terms of the policy) is given against any person insured by the policy, then notwithstanding that the insurer may be entitled to avoid or cancel, or may have avoided or cancelled the policy, the insurer shall, subject to this section, pay to the persons entitled to the

benefit of the judgement any sum payable thereunder in respect of the liability, including any amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any written law relating to interest on judgements.

Facts

[14] It is not in dispute that the registered owner of BCQ 8343 was Proton at the material time of the accident. This car was used by one of its executive known as Ang Yew Jin (Ang). Ang lent this car to one Ahmad (Ahmad) for the latter's journey to Terengganu. Ahmad is the brother of Wan Din. During the journey on 6 May 1989, Ahmad felt tired and requested Wan Din to take over the wheels. It was while Wan Din was driving the said car that the accident occurred.

[15] It is the contention of Proton that though Ang had allowed Ahmad to drive the said car, Ang has never consented to permit Wan Din to use it. And this issue of consent has been dealt with in Civil Action 53-100-98 when the Sessions Court dismissed the appellant's claim against Proton for being vicariously liable for the acts of Wan Din. And there was no appeal by the appellant against this decision.

[16] Proton then added that since Wan Din was not an authorized or permitted driver of the said car, Talasco should not be made to pay the appellant under s. 96(1) RTA. Consequently, this third party claim should be dismissed when no money is to be paid out to the appellant under the provisions of this Act.

High Court

[17] Though Talasco has pleaded *res judicata* in their defence, the High Court did not address this issue. Instead, the High Court deliberated on the evidence and arrived at a conclusion that since there was no express or implied consent given by Proton to Wan Din to drive the said car the third party risks policy taken out by Proton from Talasco is ineffective. When such policy is ineffective, the appellant's recovery claim against Talasco under s. 96(1) RTA must fail.

[18] In addition, the High Court decided that it will not entertain any claim by the appellant against Motor Insurance Bureau of West Malaysia (MIB) on the ground that this was not pleaded by the appellant.

A **Issues**

[19] By virtue of the circumstances of this case, we are of the opinion that the issues before the Court of Appeal are as follows:

B (1) Has the High Court erred in refusing to entertain the appellant's claim against MIB?

(2) Is the third party risks insurance policy effective?

1st Issue: Has The High Court Erred In Refusing To
C **Entertain The Appellant's Claim Against MIB**

[20] First it is necessary to ascertain the origin and functions of MIB. A description of these is comprehensively set out in the Court of Appeal judgment of *Ramli Shahdan & Anor v. Motor*
D *Insurer's Bureau of West Malaysia & Anor* [2006] 1 CLJ 224 @ 227:

> **Historical Background**
>
> The Motor Insurers Bureau of Malaysia was conceived in social justice and was born into the then, Road Traffic Ordinance 1958 (now The Road Traffic Act 1987). The basis of this provision in
E the said ordinance was to recognize to some extent the unfortunate position of victims of road accidents, where experience has shown, by reason of legal technicalities, that innocent victims, despite the requirements of Compulsory Third Party Insurance, failed to obtain any compensation. See *New Indian Assurance Co.*
F *Ltd v. Simirah* [1966] 2 MLJ p. 4.
>
> **Mechanism Involved In The Setting Up Of Motor Insurers Bureau**
>
> The Motor Insurers Bureau does not exist as an Insurance
G Company, but is premised on an agreement entered into on 15 January 1968, between the Bureau and the Minister of Transport. It states in so far as is material, that:
>
> > ... the Bureau will, subject to the provisions of these presents, pay or cause to be paid to the person or persons
> H in whose favour such judgment was given any sum payable or remaining payable thereunder in respect of the aforesaid liability including taxed costs ... or satisfy or cause to be satisfied such judgment.

I **[21]** The agreement referred to above signed by the Minister of Transport and MIB is commonly referred to as the Principal Agreement. There is another agreement among insurance

companies in West Malaysia contributing towards the funds of MIB. This subsequent agreement is commonly termed as the Domestic MIB Agreement.

[22] This issue concerning a claim against MIB arose in Talasco's Defence. Paragraph 19 and 20 of this defence state:

> 19. Selanjutnya, berdasarkan Perjanjian Motor Insurers' Bereau, pihak Motor Insurers' Bureau of West Malaysia adalah juga bertanggungjawab untuk mengindemniti liabiliti Encik Wan Din bin Hussin, sebagai pemandu yang tidak berinsurans, di dalam kemalangan yang material.
>
> 20. Defendan akan membawa tindakan pihak ketiga terhadap Encik Wan Din bin Hussin serta pihak Motor Insurers' Bureau of West Malaysia atas alasan-alasan yang telah dinyatakan di dalam perenggan 17, 18 dan 19 di atas.

[23] When the appellant attempted to rely on these issues to formulate its claim against Talasco, the High Court ruled:

> Di peringkat ini saya ingin menegaskan adalah jelas bahawa plaintif dalam plidingnya tidak memplidkan pemakaian perjanjian domestik (Domestic Agreement) di antara Motor Insuran's Bureau of West Malaysia (MIB) dengan defendan bertarikh 30.1.1974 atau perjanjian di antara MIB dengan Menteri Pengangkutan bertarikh 15.1.1968 yang telah diganti dengan perjanjian MIB yang baru bertarikh 25.3.1992. Oleh itu walaupun isu-isu mengenai perkara ini ada disenaraikan dalam kandungan 93D, dan walaupun dalam penghujahan mereka pihak-pihak ada menyentuh tentang perkara-perkara tersebut, Mahkamah ini tidak akan membuat keputusan tentang isu-isu tersebut.

[24] We are in full agreement with the views expressed by the trial judge. The pleaded case of the appellant against Talasco is based solely on the statutory provision of s. 96(1) RTA. The appellant has only insisted that since Talasco had issued an insurance policy against third party risks for the said car, Talasco should settle the judgment sum ordered against Wan Din in Civil Action 53-100-98 under this provision of the law. The appellant has never sought recovery under the Principal Agreement which MIB had with the Minister of Transport or under the MIB Domestic Agreement. And if at all the appellant desired to mount such a claim in this manner, she should have pleaded this and included MIB as a party to this proceedings see the case of *Ramli Shahdan & Anor v. Motor Insurer's Bureau of West Malaysia & Anor (supra)*. In this case, MIB was never included as a party to the

proceedings nor were the appellant's claim framed in the nature of a claim against them. The trial judge has therefore arrived at a correct finding on this issue.

2nd Issue: Is The Third Party Risk Insurance Policy Effective?

[25] To answer the question posed in the second issue, s. 91(1) RTA must first be examined. This section makes it mandatory for the use of any motor vehicle to have an insurance policy against third party risks covering "such person, or class of persons as specified in the policy in respect of liability which may be incurred by him or them in respect of the death of or bodily injury to any person caused by or arising out of the use of the motor vehicle or land implement drawn thereby on the road". In this instance, Talasco has issued to Proton such a policy to cover a class of persons "who is driving on the Policyholder's holder (Proton) order or with their permission". So if a person who drove the said car is not within this class of persons, then the said policy is not effective on such occasion. Whether Wan Din fell within this range of persons depended on evidence. For certain, not being an employee of Proton, he could not have presumed to have such order or consent from Proton. But could an implied order or permission be given to him by persons who were allowed by Proton to use the said car thereby making him an agent of Proton when he drove the car? If such consent was given then the policy is effective.

[26] The trial judge has answered this in the negative with these reasons:

(1) Wan Din has admitted that he did not have permission from Proton to drive the said car at the material time.

(2) Although Ang has lent the car to Ahmad, there is no evidence to indicate that Ang has also agreed to allow Wan Din to drive it.

(3) When confronted with evidence from Ahmad that Ang did not impose upon Ahmad any restriction on the use of the said car, the trial judge dismissed this by declaring this as hearsay when Ang did not personally testify at the trial.

[27] But what was stressed upon us by Talasco and Proton during this appeal was not the findings of the High Court. Instead, emphasis was on the decision of the Sessions Court in Civil Action 53-100-98. Talasco and Proton submitted that this issue was already decided by the Sessions Court when it dismissed the appellant's claim that Proton was vicariously liable for the act of Wan Din. This same issue now raised should not be decided twice over.

[28] Against this argument, the appellant's counsel gave the feeble excuse that the findings of the Sessions Court was based on the non existence of a master and servant relationship between Proton and Wan Din. It did not include a situation where the driver of the said car was not authorized to drive by Proton.

[29] We are of the view that this perspective of the appellant is devoid of merit. Vicarious liability is not confined only to a master and servant situation. It includes master and servant and/or agent. Agent was included in the pleaded case of the appellant in Civil Action 53-100-98 where at para 2 says:

> Defendan Pertama adalah pada sepanjang masa material pemandu kereta yang didaftarkan dengan nombor BCQ 8343 yang memandu kereta tersebut sebagai ejen, pengkhidmat atau orang yang memandu dengan keizinan Defendan kedua.

[30] So when agent was included for the purpose of determining whether consent or permission was granted to Wan Din to drive the said car, a finding on the absence of vicarious liability on the part of Proton would inevitably mean that no such order or permission was ever given by Proton to Wan Din at the material time to drive the said car.

[31] When this issue has been decided and there was no appeal against it then the principle of *res judicata* applies. The rational and effect of this is best explained by Gopal Sri Ram JCA in *Hartecon JV Sdn Bhd & Anor v. Hartela Contractors Ltd* [1997] 2 CLJ 104:

> The principle of *res judicata* is based on the need of giving a finality to judicial decisions. What it says is that once a *res is judicata*, it shall be not adjudged again. Primarily it applies as between past litigation and future litigation. When a matter – whether on a question of fact or a question of law – has been decided between two parties in one suit or proceeding and the decision is final, either because no appeal was taken to a higher Court or because the appeal was dismissed, or no appeal lies,

neither party will be allowed in a future suit or proceeding between the same parties to canvass the matter again. This principle of *res judicata* is embodied in relation to suits in s. 11 of the Code of Civil Procedure; but even where s. 11 does not apply, the principle of *res judicata* has been applied by Courts for the purpose of achieving finality in litigation. The result of this is that the original Court as well as any higher Court must in any future litigation proceed on the basis that the previous decision was correct.

The principle of *res judicata* applies also as between two stages in the same litigation to this extent that a Court, whether the trial Court or a higher Court having at an earlier stage decided a matter in one way will not allow the parties to re-agitate the matter again at a subsequent stage of the same proceedings.

A decision given by a Court at one stage on a particular matter or issue is binding on it at a later stage in the same suit or in a subsequent suit. (See *Peareth v. Marriott* [1883] 22 Ch. D 182, *Hook v. Administrator-General of Bengal and Others* LR 48 IA 187 and *In the Matter of the Trusts of the Will of Tan Tye (Deceased) Yap Liang Neo v. Tan Yew Ghee and Another* [1936] MLJ 141, 147-151). Parties cannot raise a second time in the same suit an issue that has already been determined either expressly or by necessary implication. (See *Louis Dreyfus v. Aruna Chalayya* LR 58 IA 381). (emphasis added.)

A failure to adhere to the principle expressed in the judgment of Sharma J just quoted may lead to chaos in the conduct of civil proceedings.

[32] One may argue that though the appellant and Proton may be common parties in Civil Action 53-100-98 as in this suit, but not Talasco. The simple answer to this is that in a recovery proceeding under s. 96(1) RTA, the role of Proton as the insured is assumed by the insurance company which issued the third party risks policy – see *Ramli Shahdan & Anor v. Motor Insurer's Bureau of West Malaysia & Anor (supra)* and *Rafiah bte A. Bakar v. East West-UMI Insurance Bhd* [1993] 1 CLJ 431. By this, Talasco is considered a party in the said civil action.

[33] So irrespective of the findings of the trial judge in this case, the issue on whether Proton had ordered or given permission to Wan Din to drive the said car at the material time has already been decided by the Sessions Court in Civil Action 53-100-98. Relying on the principle of *res judicata*, this same issue should not be litigated again. This matter has been decisively determined and

there was no appeal against it. When this finding has a binding effect, it is our view that the policy of insurance issued by Talasco to Proton is ineffective (since it does not cover a person who is driving without the order or permission of the policyholder) for the purpose of this recovery claim.

Conclusion

[34] Upon this ground, we would dismiss this appeal with costs to both the respondents. The deposit to the respondents to account of taxed costs.

[35] Since Proton's counsel has brought to our attention that the High Court has inadvertently awarded costs against the appellant when dismissing Talasco's third party proceeding against Proton which should be borne by Talasco, the order of the High Court is varied to the effect that the costs below be paid by Talasco to Proton on the dismissal of Talasco's third party claim against Proton.